IN THE MATTER of the Human Rights Code of Ontario

AND IN THE MATTER of the complaint of Winston Challenger against the G.M.C. Truck Centre (a division of General Motors of Canada Ltd.) and J. Hampson, M. Galligan and B. Dehaas

APPEARANCES

Thomas Bell Jason Gavras	On behalf of the Ontario Human Rights Commission
Jason Hanson	On behalf of the Respondents

DECISION

INTRODUCTION

Winston Challenger, a black man, was born in Antigua where he received training as a mechanic and eventually obtained a Grade "A" mechanic's certificate. He came to Canada in 1965 and has practiced his trade here since 1966, working for a number of employers until establishing his own repair service (W.C. Diesel) in 1986.

Mr. Challenger obtained probationary employment with the respondent G.M.C. Truck Center (hereafter referred to as the "Centre") on March 5th, 1984. He was formally dismissed from that employment the following April 30th, and it is his allegation that the reason for his dismissal was unlawful discrimination in

employment by the Centre and three of its managerial employees: Joe Hampson, Service Manager, Martin Galligan, General Foreman, and Bill Dehaas, foreman. The complaint also alleges harassment in the work place by the same respondents.

The provisions of the Ontario Human Rights Code, 1981 (hereafter referred to as "the Code) that are alleged to have been contravened read in part as follows:

> 4.(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin ...
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin ...
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

I was appointed on the 3rd of September, 1987, as the board of inquiry to hear and decide Mr. Challenger's complaint. The hearing into this matter began in the City of Toronto on the 7th of December, 1987, at which time a preliminary motion for particulars made on behalf of the respondents was dealt with and dates for the continuation of the hearing were set. The hearing resumed on April 18th, 1988, and required another fourteen days, resulting in over three thousand pages of evidence and one hundred and nine exhibits.

There was no suggestion in the evidence of any overt acts of discrimination, and the validity of the complainant's contention that he was harassed ultimately dismissed because he was black

depends upon the inferences to be drawn from the evidence.

As it was the Commission's position that the dismissal of the complainant was unwarranted and must have been the result of unlawful discrimination in employment, the main thrust of the evidence was as to whether Mr. Challenger's performance warranted his dismissal. This required considerable technical information, extensive explanations and the close examination of a great many work orders involving both the complainant and others with whom his work was compared. Considerable evidence was also adduced regarding the issue of damages. Since this massive amount of evidence cannot be dealt with conveniently in separate narrative form, apart from the following brief outline of the sequence of events, the bulk of it will be considered in relation to the various contentions of the parties and the particulars set out in the complaint form itself.

EXPOSITION OF FACTS

Mr. Challenger's resume (exhibit 9) indicates that he worked for the Tomlinson Work Shop in Antigua from January of 1960 to December of 1965, during which period he served as an apprentice mechanic until obtaining his grade "C" certificate in March of 1963 and his grade "A" certificate some six months later, and it lists the following as his employment history after coming to Canada in December of 1965:

1. January 1966: MacMillan and Saunders. Mechanic.

2. June 1966 - March 1969: White Motor Company. Mechanic.

3. March 1969 - June 1973: Elgin Ford. Licenced (sic.)

mechanic at Ford Dealership. Cars and Trucks. Wrote licencing (sic.) tests in 1969. Received certificate in February 1970. [How he came to practice in Ontario as a mechanic, then as a licensed mechanic, prior to getting his Ontario certificate in 1970 is not explained.]

4. June 1973 - December 1980: Kenworth Trucks. Licenced (sic.) mechanic; promoted to foreman from 1975 to 1978 (2 1/2 years). [He said he left the foreman's job to get off the night shift.]

5. January 1981 - June 1982: Westport Express Truck Centre. (W.C. [i.e., himself] in partnership with two others). Truck and auto repairs and maintenance.[He testified that he was the foreman and that there were two or three other mechanics. He said he got out of the partnership because things were not going right.]

6. June 1982 - July 1983: Mid-National Leasing. Truck and van mechanic. (Company dissolved and they did not keep the mechanics).

7. July 1983 - March 1984: Peterbilt Truck Company. General mechanic specializing in diesel engines.

8. September 1984 - November 1984: Muscillo Transport. Mechanic/foreman.

9. November 1984 - October 1896: Miller Paving. Mechanic and foreman.

10. October 1986 to present: W.C. Diesel. Self-employed auto repair service.

A number of serious discrepancies in this resume came to light during the course of the hearing. Since they relate to credibility, they will be examined immediately after this review of the principal sequence of events and before analyzing the technical evidence in dispute.

The G.M.C. Truck Centre sells new and used trucks and it services trucks of all makes and descriptions. It is an obviously large enterprise with several buildings on a twelve acre site nearly half of which is a storage compound. At any one time from

450 to 800 trucks are in the compound for sale, and from 250 to 300 trucks are in the service area.

The repair shop itself is divided into a number of more specialized shops and areas. It has 48 truck bays in all. The shop is relatively very clean, and its walls have been painted white to assist in keeping it that way by making it easier to detect excess dirt. It houses some 54 technicians generating about 90,000 productive hours in the completion of around 13,000 work orders per year.

Customers with warranties represent about 45% of the Centre's service business. Internally generated service needs (such as pre-delivery inspections) represent another 15% to 18% of such business and "retail customers", who must themselves pay for their repair services, represent the rest.

In 1984, about 85% of the service work was in relation to gasoline-powered vehicles and only a very small number of propane-powered trucks were serviced. Of the rest of the trucks serviced, 5% were heavy-duty diesels, 8% were medium-duty and 2% were light-duty. The principal diesel engines to be found were the Detroit, the Cummins and the Caterpillar. Of the heavy-duty diesels worked on, 80-85% would have been Detroit engines, since they are produced by a subsidiary of General Motors, and the rest would have been divided about equally between Cummins and Caterpillar. The diesel repair business has fallen off since 1981 because of great improvements in the product. Such work is cyclical and the peak diesel engine overhaul period, for which

work the competition is keen, runs from November to the end of March.

In February of 1984 Mr. Challenger applied for work at the Truck Centre. He had been told by someone at the Peterbilt Truck Company where he then worked that the Centre was advertizing for mechanics, that they paid very well, and that they provided excellent fringe benefits. The Centre was in fact running an advertisement at that time which specified that they were looking for three "licensed truck mechanics": one with "Detroit and Cummins Diesel experience", one with "G.M. Automatic Transmission experience", and one with "G.M. Electric and Carburetor experience". (Exhibit 11.)

Mr. Challenger said that he did not see the advertisement himself, but that he went to the Centre where he claims to have seen a sign on a bulletin board downstairs in the mechanics' work area indicating that the Centre was seeking a "Truck Mechanic Diesel" and that, in response to his query, he was directed to the office of the Service Manager, Joe Hampson. He testified that when he described himself to Mr. Hampson as a "general mechanic" he was told that they (i.e., the Centre) were not interested in a general mechanic, but in a mechanic "interested in diesel", and that when he said he had experience in Cummins as well as Detroit diesels he was given an application form and sent to see Mr. Galligan, the General Foreman, who made the hiring and firing decisions with respect to the mechanics.

Although Mr. Challenger's application form purported to

disclose his experience after 1973, it made no mention of his having worked as a mechanic at Inter-City Truck Lines. (The name of this company was at times spelled differently by the various reporters involved: e.g., Intercity Trucklines.) Mr. Galligan testified that he felt that that experience was weak in respect of light-duty trucks. He said that it did "cause me some concern that for at least ten years he's had no light-duty truck experience, according to this resume." Mr. Galligan testified (at pp.2031-2034) that he told the complainant of his reservations since about 80% of the Centre's repairs are to light-duty trucks, and he said he counselled him to think carefully about leaving a secure position for a probationary position at the Centre. "I suggested to Mr. Challenger that he go home and he think about it. That I am quite willing to hire him. That I had no doubt that he had heavy-duty engine experience and diesel engine experience and that I'm quite willing to give him a chance but he should think about it." (P. 2033.) He said that he explained to the complainant what was involved in the probationary process and his practice of getting written evaluations from the foremen. "Mr. Challenger assured me that he was quite willing to take his chances with a probationary period because he was an excellent general mechanic and things hadn't changed that much in ten years; he would adapt very quickly." The complainant was then offered a position, and he commenced working at the Centre on March 5th, 1984, as a probationary employee on the day shift under Foreman Dehaas, against whom his complaints are in the main

directed, as the evidence clearly shows.

Mr. Dehaas provided Mr. Galligan with two written evaluations of Mr. Challenger's performance, the first on March 18th (exhibit 66), the second on April 12th (exhibit 68). The first evaluation was acceptable having regard to the short period in question. (Indeed, in my opinion it was slightly better than the first written evaluation of Mr. Bartlett, the other probationary employee whose candidacy was successful.) However, the second evaluation was poor and, according to Mr. Galligan, he called Mr. Challenger to his office on April 12th to advise him that he was being dismissed. He said that in consequence of Mr. Challenger's submissions he decided to switch him to the night shift in order to obtain another foreman's assessment.

While acknowledging that he met with Mr. Galligan just before going on to the night shift, Mr. Challenger denied that he was told at that meeting that he was being dismissed, denied that he asked for an opportunity to work with someone else, and denied that he was put on the night shift in order to give him that second chance. (See pp. 862-864.) Despite those denials, counsel for the Commission appears to have accepted Mr. Galligan's evidence on that point, going on to argue that the true date of dismissal was April 12th, not April 30th, and that the complainant's job performance during his last two weeks should not be taken into account as any justification for his dismissal.

In any event, the evidence shows clearly that Mr. Challenger was transferred to the night shift after April 12th, and not "in

or around the end of March" as erroneously stated in paragraph 8 of the complaint. He then worked under the direction of the night foreman, Boris Hladysh, except when the latter was replaced for one shift and part of another by Mr. Galligan himself. It was the complainant's evidence that he experienced no problems at all while working under either of them.

Upon receipt of Mr. Hladysh's written evaluation of Mr. Challenger's performance, Mr. Galligan told the night foreman to instruct the complainant at the end of his shift on Friday, April 27th, to report to Mr. Galligan the following Monday morning. Mr. Challenger was informed at that Monday meeting that he was being dismissed.

Mr. Challenger and Mr. Galligan are not in complete agreement as to what reasons for his dismissal were given to the complainant at that time. Mr. Challenger's complaint cites as the reasons two specific accusations of improperly performed work, for which he denied responsibility. Mr. Galligan's evidence was that the basis for the decision was that the complainant's work did not meet the Centre's standards. (That is certainly the reason stated on an internal memorandum dated May 1, 1984: exhibit 80.) He amplified this in evidence by saying that Mr. Challenger's work at the Centre was slow and sloppy, and that he was not sufficiently experienced in light and medium duty truck repairs. Although one of the incidents to which Mr. Challenger referred related to work which Mr. Galligan said led to the decision, the aspect of that work concerning which the General

Foreman said he was dissatisfied was not as described by Mr. Challenger.

At or towards the end of their April 30th meeting, Mr. Galligan undertook to call the other two foremen to see whether they might have anything further to say that might alter matters. Mr. Galligan testified that he made that call, that neither Mr. Dehaas nor Mr. Hladysh felt that the decision should be changed, and that he reported this to the Complainant.

The remainder of the evidence relates to the various contentions of the parties and is of a technical nature that does not lend itself to recitation in narrative form as part of an "exposition of facts". It is dealt with in relation to various aspects of the two specific allegations made in the complaint, namely, that through unlawful discrimination the respondents infringed the complainant's rights to equal treatment in employment and to freedom from harassment in the workplace. Before getting into that, however, there is the matter of Mr. Challenger's misleading resume to consider.

The complainant was asked whether he had ever worked for a company called Inter-City Truck Lines. He replied that he could not recall. He knew where it was located and he "used to drive past there every day". Mr. Challenger's wife was called to give evidence in relation to damages. During cross-examination she acknowledged that her husband had worked for Inter-City Truck Lines, saying "that was years ago". A Mr. Carstentsen was later called as a witness by the respondents. He had been employed at

Inter-City from 1959 to 1985. He testified that Mr. Challenger had worked for him there "somewhere in the middle to late seventies". Being no longer employed at Inter-City, Mr. Carstentsen lacked access to their records and could not recall the exact dates.

Counsel for the Commission suggested in argument that this omission was merely a matter of poor recollection or a simple error. I cannot accept that contention. It would be easy to understand that someone who has just been asked to list the places where he has worked might forget to mention one of them, particularly when it was a decade ago. However, it is difficult to believe that such an omission would occur accidentally in a resume prepared for employment purposes. It is also difficult to imagine anyone driving past a place of former employment every day for some period of time and not recalling having worked there. Although his wife remembered it, not only did Mr. Challenger not recall working at Inter-City, but he shows no gaps in his resume. Every month since his arrival in Canada is accounted for, as though he actively recalls working elsewhere while in fact he was working at Inter-City.

Towards the end of the complainant's examination-in-chief, counsel for the Commission began a line of questioning obviously related to the matter of damages. After describing some of the trauma consequent upon his having been fired by the Centre (he said he turned to drink and abused his family), the following exchange took place between Mr. Challenger and Counsel for the

Commission (beginning at page 147):

> Q. Did you go back to work right away after you got fired?
> A. No.
> Q. When did you go back to work?
> A. It was September.
> Q. Why didn't you go back to work before then?
> A. I wasn't in no shape.
> Q. What do you mean by that?
> A. I was gone, I was in no shape to go to work.
> Q. Had you ever taken four months off in a row before?
> A. No, the first time.
> Q. Since when?
> A. Since 1966.
> Q. You didn't work from May to September, 1984?
> A. Yes.
> Q. Why not?
> A. Because I was just gone. I figure if I go to work I may hurt myself.
> Q. Did you do any work between May and September, 1984, any work at all?
> A. I can't recall.
> Q. Then in September, 1984, you started working for Muscillo Transport?
> A. Yes.

In cross-examination Mr Challenger said that he did not apply for unemployment insurance benefits at any time in 1984 (p. 362), nor did he "register with the Canada Employment [or Manpower] Centre" for help in finding employment (p. 491). Asked why not, he replied "I was in no shape ... for working at that time". This is followed by the questions and answers set out below:

> Q. You didn't register with the Unemployment Insurance Commission. You didn't register with Canada Employment Centre. When was it then that you commenced looking for other employment?
> A. ... From the day I left there I was phoning around looking for another job.
> Q. Did you work for anyone between April and September of 1984?
> A. No.
> Q. So you then, I take it, were in receipt of no

income?
A. Right.

One of the witnesses called by the respondents was a Mr. Johnson, an employee of Muscillo Transport who brought with him records showing that Mr. Challenger had applied for work there early in May. The application form provides information boxes with the headings "last company", "second last company" and "third last company" worked for. Mr. Challenger listed under these headings "Express Truck" (indicating he left there because it went under) and "Kenworth Trucks" (which he states he left because he "went in own business". (Exhibit 100.) Of course, the falsity of that information is apparent; but more dramatic was the revelation that he had signed an income tax TD1 form with them on May 14th of 1984 (also in exhibit 100) and that, according to his employment record (exhibit 101), he had actually worked for them from May 5th to August 27th. Another exhibit indicates that he actually left "as of September 1, 1984" (exhibit 104). He earned $11,182.08 before deductions (exhibit 102) for a period of time in respect of which, but for Mr. Johnson's evidence, he would no doubt have claimed damages for total loss of earnings owing to his being too distraught to work. Not only did he work during this period of allegedly great trauma during which he was in no shape to do so, but the payroll record (exhibit 103) shows that he averaged about 8 hours of overtime on top of a 44 hour work week. Again, counsel for the Commission suggests that this is simply an error, a matter of faulty recollection. He also said (at p. 3133) that "when we get to the

damages I will argue, sir, that from a review of exhibit 103 it appears Mr. Challenger worked part time for most of the time that he was at Muscillo." How one could characterize as part time a work week that averages 52 hours escapes me. (It may be noted that, although he gave incorrect evidence as to <u>when</u> he worked there, Mr. Challenger said he earned twelve dollars an hour at Muscillo (p. 360) and that he "used to work a lot of hours" there (p.496). Indeed, in trying to explain his total earnings for 1984 as shown on his income tax return he attributed much of it to Muscillo, claiming that he worked 70 to 80 hours a week there (p. 438). The TD1 form shows he was paid $11,182 by them for sixteen weeks' work, which would indicate just over 58 hours work a week. It was less in fact because of higher wages for overtime.) I found no reference to this matter in the transcript of counsel's submissions as to damages.

Mr. Challenger's false testimony on this point cannot simply be sloughed off or made to appear innocuous in the way suggested. His steadfast denial that he worked during those four months was bolstered by affirmative assertions as to why he could not have done so. He was in no shape to work! He was afraid he would hurt himself! And so, for the first and only time in his working life, he was idle for four months in a row. He earned over $11,000 in that period; but it is his evidence that he was in receipt of no income. While he undoubtedly spoke the truth when he said he was <u>looking</u> for employment the day he left the Centre, one wonders why he would do that if he were in no shape to work. Perhaps he

replied truthfully, though inconsistently, to that question because of some understanding that any award he might get could be affected by his efforts to mitigate his losses. However when he was asked during his examination-in-chief when it was that he started to look for a new job he replied "About July." (p. 159.)

I find the complainant's evidence with respect to this matter unbelievable. Even if it were not concluded that this testimony was a lie, at best the complainant has demonstrated the serious unreliability of his evidence. And there are other instances of confusion, contradiction and possibly deliberate untruths in that evidence, such as the following additional incident regarding his employment history.

As part of his testimony relating to the extent to which he had been made to suffer, Mr. Challenger testified that he had never been fired before and that he has never been fired since. This is contradicted by the evidence of a Mr. Dolby of the Miller Paving Company. That gentleman testified that the complainant had been dismissed from the company, and went on to explain "the reason for his dismissal" (those are his words). Mr. Challenger's work was such that "he would have had to issue purchase orders on behalf of Miller Paving" regarding the vehicles being worked on. He issued such an order for personal purposes. He was told that this was not permitted and warned not to do it again. He repeated the offence. Mr. Dolby called him in again and told him that "we would take the cost of the item from his pay and then as of that particular point in time his employment with Miller was

terminated."

In the course of argument, Counsel for the Commission said that "if we look at Mr. Challenger's evidence we see that he felt in the circumstances he had to leave and Mr. Johnson obviously felt he had terminated him. When you look at the paper it says "terminate" but I think it is fair and one is able to differ on that point. ... Surely you can't be fired if you have already quit and vice versa." I was unable to find anything in the evidence to support that contention. Clearly Mr. Challenger had not quit his employment at Miller Paving prior to going into Mr. Dolby's office, nor is there any evidence to the effect that, upon entering, he blurted out "I quit" just before Mr. Dolby told him that he was fired. As counsel acknowledged, the exhibits bear out that he was fired and nothing more need be said. Thus, we have another instance of the complainant's unreliability, if not untruthfulness.

I now turn to the first of Mr. Challenger's two formal complaints.

THE ALLEGATION OF DISCRIMINATORY TREATMENT CONTRARY TO S.4(1) OF THE CODE

One of the premises upon which the Commission based its submission that the respondents had infringed the right accorded to the complainant by section 4(1) of the Code was the assertion that the respondents' reasons for his dismissal are without foundation in fact, and that the complainant was neither a slow nor a sloppy worker, nor was there justification for impugning his experience on light and medium duty trucks. The other premise

was an allegation of racial discrimination by the respondents against other black employees. Their argument was that, since there was no good reason to fire the complainant, and since there was evidence of racial discrimination against others, then (even in the absence of evidence of overt discrimination against the complainant) the proper inference is that such discrimination was the (or a) cause of his dismissal. The parties' contentions in this regard can be summarized as follows:

> A. The Commission alleges that, although engaged as a diesel mechanic, the complainant was assigned work on gas-powered vehicles as well. The respondents, who questioned the relevance of that assertion, maintained that he was hired as a general mechanic with diesel experience in any case.
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> B. The Commission alleges that the foremen retained control of the "time tickets" used to record the time it took the complainant to complete various jobs, making such records suspect. Moreover, the foreman refused the complainant's request to "clock off" a job even though he was not working on it. Finally, it was asserted that some apparent delays in completing a job were occasioned by being "clocked on" while bringing a vehicle into the shop, waiting for parts in order to resume work, or waiting for the foremen to assign a new job. The respondents denied that the foreman controlled the time tickets, explaining that, subject to four exceptions, the general procedure at the Centre was for the mechanics to clock themselves on and off specific jobs. They denied improperly refusing to allow the complainant to clock off any jobs. They stated that getting the vehicle into the shop and getting parts for it are normally part of the job, and that not only was the shift foreman or someone covering for him always nearby, but there was a loudspeaker paging system as well, making delays in getting new assignments minimal.
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> C. The Commission alleges that, even if the times taken on various operations are accurately documented, the overruns in question were wrongfully attributed to the complainant; moreover, the assessments of relevant work orders by independent experts are to the effect that Mr. Challenger's work was completed in a timely way. The respondents maintain that their conclusions

regarding Mr. Challenger's slowness are borne out by observation and the reasonable analysis of the documentation. They deny the competence of one of the Commission's "experts", indicating flaws in his testimony, and submit that, in the final analysis, when provided with correct information the Commission's other expert supported their conclusion that the complainant was too slow.

D. The Commission argued that the complainant's record before and after his employment at the Centre shows that he is an above-average mechanic and that this supported the contention that he was not a slow worker. The respondents reply that Mr. Challenger's work record elsewhere does not prove that he met the Centre's standards. They point to evidence to the effect that the standards in their kind of operation are higher than the expectations in the places where the complainant was previously employed.

E. The Commission asserted that there was no evidence proving that the complainant was sloppy or dirty. Although admitting that they could not prove conclusively that Mr. Challenger had soiled the inside of a mobile home (the specific instance of sloppy work that was given), it was the respondents' submission that they had reasonable grounds to believe that to have been the case.

F. The Commission submitted that the allegation of discrimination against the complainant was supported in the following ways: firstly, by the testimony of third parties to the effect that the Centre had discriminated against them on the basis of their colour; secondly, that very few of the Centre's mechanics were black; thirdly, that a white probationary employee received more favourable treatment. The respondents submit that the unsubstantiated allegations of discrimination against others are untrue, that the other probationary employee was not given favourable treatment, and that there was no evidence adduced to show that the number of black mechanics at the Centre was relatively low.

Before turning to a detailed analysis and disposition of these contentions, it will be helpful to describe the various steps and procedures involved in the Centre's truck repair business and why it is that the Centre asserts that the time taken to do repair work is of major concern to it.

When a truck is brought into the Centre for repairs the customer deals with a service advisor who usually remains as the customer's contact for the whole time the truck is in the garage. The advisor listens to the customer's description of the "symptoms" of the problem and "translates them into mechanical repair language" which he writes on a work order (hereafter referred to as a "w/o") for the benefit of the foremen and mechanics who have to effect the repairs. He invariably writes them down in the order in which the customer relates them. The advisor will make a cursory inspection of the vehicle in order to assist in writing up the order and to check on existing defects or problems so as to avoid later disputes as to whether they were caused while in the garage. It is the advisor's responsibility as well to establish the length of time the various repairs should take to complete.

Each separate repair listed on the w/o is a distinct "operation" to which a code letter ("A","B", "C" etc.) is given. These letters are assigned in alphabetical order beginning with the first operation the advisor happens to have written down. The letters have no fixed or constant meaning, such that on every w/o "A" means "engine", "B" means "brake", "C" means "electrical", and so forth.

It should be noted that Mr. Challenger was badly confused with respect to this relatively simple feature of the w/o's (see p. 102.) During his lengthy examination-in-chief he reviewed a great many of these documents in which the operations referred to

by a given code letter varied from w/o to w/o. For instance, in one w/o the letter "A" might have been used for an operation involving the overhaul of an engine, whereas in another w/o the letter "A" might be used in relation to work on an automatic transmission. Yet he remained confused in this regard at the start of his cross-examination (see pp. 284-6).

When the foreman receives a w/o he determines which mechanic will carry out each of the operations listed on it. Depending on what is involved, the same mechanic may be assigned more than one of the operations on the same w/o, or circumstances may require more than one mechanic to work on a given operation before it is completed. For instance, the work on operation "A" may not be completed by the first mechanic at the end of his shift and a second mechanic may carry on with that operation on the next shift.

It became evident that the separate coding of distinct operations served a number of purposes. In particular, it keeps track of the mechanics' time on specific operations and relates to the billing procedures, as will be seen presently.

The mechanics (including those on probation) are amongst the hourly-rated employees of the Centre whose hours are kept track of for pay purposes on "payroll time tickets". These were often referred to by witnesses as "time cards", as distinct from the "time tickets" next described. Assuming that he is there for the full day-shift, the mechanic will "punch" these payroll time cards four times: at 8:00 a.m., 12:00 noon, 12:30 and 4:30 p.m.

This is done by putting the card into a time clock which is then activated, thus signifying that the mechanic was on duty for the times in question, but not indicating what it was that he did.

As so-called "productive employees", the mechanics also make use of a second time ticket which is different in form and on which is recorded the work they accomplished during their shift. This time ticket has a white copy on top which is separated from a harder buff copy by a carbon. The white copy is divided from top to bottom into nine perforated sections. Each section has on its left side small boxes in which to insert the repair order number (the "w/o" number, as it was more frequently called), the operation letter code, and the mechanic's number (every mechanic being assigned a permanent number by which he is identified throughout his employment). On the right side of each section there are three boxes in which the times when the mechanic started and ended work on the operation are shown, together with the elapsed time, which is recorded in tenths of an hour (e.g. .1 equals 6 minutes; 2.2 is two hours and twelve minutes). The nine sections into which the white copy is divided are filled in starting at the bottom. When the bottom-most section has been completed it is torn along its perforated line, removed from the white copy and affixed in due course to the work order form to which it relates. The section immediately above it will be the next to be completed and removed. It may relate to a different w/o to which it will be affixed. This process continues until the shift is over or all sections are removed. If the total time that

has elapsed on the nine sections of the card is less than eight hours, a new time ticket will be commenced for the mechanic so that his time tickets for the shift will total eight hours.

Since the perforated white sections end up attached to different w/o's, the hard buff copy remains as a separate and complete record of what the mechanic did that day. For instance, exhibit 59 is a photostat of all the hard buff time tickets used by Mr. Challenger showing every w/o and specific operation he worked on while employed at the Centre.

There is a "control tower" in the garage where, at the start of each shift, a timekeeper clocks in ("punches on") all of the mechanics scheduled to be working. When the buzzer sounds for the shift to begin the tickets relating to his crew are taken to each foreman who records each mechanic's number in the section at the bottom of the time ticket, together with the w/o number and operation he has decided to assign to that mechanic at the start of the shift. The time ticket is then kept in a clip at the work station. When the mechanic finishes working on the operation on which he is clocked (for whatever reason, such as that the operation was completed, or work on it has been suspended pending arrival of parts, or he has been re-assigned to some other operation), the time ticket is removed from the clip and the mechanic is "punched off" that operation and <u>immediately</u> "punched on" to another operation (whether on the same w/o or not). Whether it is the mechanic himself who punches off and on at this stage is one of the major issues between the parties, and I will

address it presently. In any case, this process is repeated as often as necessary until the end of the shift.

All eight hours of a mechanic's shift must be accounted for on his time ticket. For instance, if he comes in late, he will already have been punched in by the control tower on the bottom perforated section of his time ticket, but the foreman will not have filled in the information about the w/o and operation because the man was not there to receive an assignment. When the mechanic arrives he will punch in on his payroll time card so as to start the time running for pay purposes. He will then take his work production time ticket and write "late" in the box for the w/o in the bottom section of the ticket on which he has been clocked in. He will then punch out on that section and punch in again on the section above, at which point an assignment will be written into that next section and productive time will begin. A similar procedure is used if a mechanic leaves early.

As soon as a mechanic is punched off an operation he is punched back onto the next higher section of the time ticket, and this is so even if there is nothing productive for him to do. In that case, the code "No. 655" is written into the w/o number box, indicating to the auditors that the man was idle because there was nothing to assign to him. He is, of course, entitled to be paid for his time, which loss is debited to a special account.

The repondents testified that the timekeeper in the control tower not only punches the mechanics on to these time tickets at the start of the shift, but punches them off when they go on

their break, back on when they return from the break and off again when the shift is over and they leave. This evidence (which was supported by the Commission's witness, Mr. Yussuff, at pp. 1269-70) was not inconsistent with the Commission's assertion that the mechanics had no control over their time tickets, and counsel for the Commission did not seek to refute it. However, Mr. Challenger testified that the only times he "punched on and off" these time tickets were when he arrived in the morning, went to lunch, returned from lunch and left for the day.

Again we find the complainant mistaken or confused about an important aspect of the case the Commission is seeking to make. He seems to have some recollection of punching on and off these time tickets at certain times each day; but, since he could not have done so on the occasions he believes he did, he would have to have done so on other occasions. This cannot but cause one to wonder whether or not he was mistaken or confused about that aspect of the clocking procedure that <u>is</u> at issue: namely, his assertion that the foremen punch the mechanics off and on operations at all other times, from which allegation of fact it is to be inferred not only that they are able to manipulate to the mechanic's advantage or disadvantage the time recorded for work done, but that one or more of the foremen under whom he worked took advantage of that circumstance in order deliberately to falsify Mr. Challenger's record to make it appear that he was slow as an excuse to fire him.

The reason for the Centre's concern about the time it takes

its mechanics to complete work is not simply that it charges its customers on a "flat rate" basis, but the small hourly net profit margin upon which it operates.

Repairs are of two kinds: they either involve a warranty, or they do not. Where a warranty is involved the customer does not pay. The company that issued the warranty does; but it does not pay actual straight time taken in excess of the length of time that it has determined each given operation in a repair job should take. Each company has its own tables or manual indicating what these times are. The manual that was referred to repeatedly in the evidence was the flat rate manual for the Detroit diesel engine. The way in which this complex and sophisticated document works was explained at length with the assistance of various illustrations. There is no need to repeat that here. Suffice it to say that the Centre can only recover from the warrantor the lesser of the actual time spent on work and the time allowed in the manual, unless the company agrees to pay more following proper justification for the particular overrun.

The hourly rate that can be charged by the Centre (its "door rate") is a matter of agreement with the warrantors. Mr. Galligan explained this aspect of the matter in this way (p. 1786-1787):

> ... in North America it's a formula based on your costs ... which you are allowed to average over the past year. And then you apply a formula, such as multiply it by 1.738 will be the upward limits of what we would accept as a door rate. So if you were allowed under the formula to charge $42 an hour and you applied for $45, they would demand justification with records of your costs, and we would submit those. ... at the present time, the GMC Truck Centre could justify $47 an hour. The traffic wouldn't bear $47 an hour because part of

> the dealer agreement is that you will not charge the manufacturer more for repairs than you charge retail customers. So we would be fixed by what our competitors charge or what our customers would bear as a reasonable price for an hour's labour. ... [W]e charge, I believe right now, $42 an hour for light-duty repairs, and medium- and heavy-duty repairs we charge $44. ... Everybody's door rates change differently because our union agreements end at different times. So our competitor will leap-frog us and then in time we'll leap-frog them; but we're all within a dollar an hour of each other.

Mr. Galligan's unchallenged testimony regarding charges, costs and profit rates in the Centre's repair business demonstrated the dramatic significance of overruns and the understandably great concern regarding the slowness of mechanics (at pp. 1772-3):

> [If you took two hours on a job] and you could only recover 1.6 from the manufacturer because it was under warranty, then you would write off the .4 hours into what we call an "Erosion Account". In other words there was an overrun on the work order. We could try to justify it to the manufacturer - and believe me we try. But, in the event that we can't, and we cannot claim more than 1.6, we would write off that .4 hours ... it doesn't sound like a lot of time - it's 24 minutes. If we were to charge $40 an hour ... 1.6 would pay us $64. If our mechanic took two hours to do the job, it means we're getting paid $32 per hour as opposed to $40 an hour. In the case of the GMC Truck Centre at the present time, our net potential profit per hour is $2.71 at today's rates. In this particular situation here, we would have lost X amount of dollars on doing that job. ... as far as net profit is concerned, just 24 minutes overrun can show a loss on a 2 hour job. ... as far as accountability is concerned, the erosion is devastating. It is hard to impart that to mechanics who say, "I was only twenty minutes over". Absolutely, he's right. But it does cause an erosion multiplied by, in some cases, 55 mechanics, over 90,000 hours in a year. If you're having an exceptionally bad year it can add up to a lot of dollars.

Another illustration of the importance of avoiding overruns that Mr. Galligan provided was in relation to one of the w/o's in

dispute, namely No. 21409. (That which was in dispute was whether there had been an overrun attributable to the complainant, not the economics of the matter.) The Centre wrote off (or "low grossed", as was the expression most frequently used) 2.2 hours on a job it says should have taken only 4.5 hours to complete. The door rate was then about $35 an hour, so the write-off was about $75. That represents the net profit on at least 25 hours of a mechanic's labour.

The respondents indicated that probationary employees tend to work faster than they normally would in order to make the best impression possible. Given the risk that they would be even slower once the probationary period was over and they were clothed with the protection of union membership, this aspect of the complainant's performance took on added importance.

It may be observed that the difficulties managers feel they face in getting rid of employees they consider to be under-productive might well lead to the dismissal of probationary employees at the least sign of potential future trouble. Although I would think that that is virtually self-evident, the following exchange between counsel for the respondents and Mr. Majeau, one of the Commission's experts, is testimony pointing in that direction (beginning at p. 1224):

> Q. Now, you mentioned at the end of your examination-in-chief your comments about probationers and how you treat them.
> A. Yes.
> Q. And I gather you've got this collective agreement with the Teamsters 938?
> A. Yes, we're that lucky!
> Q. Are you down to a 30 day probationary clause?

A. Yes, it's 30 calendar days.
Q. 30 calendar days.
A. You make sure you don't hire them on a long weekend because you haven't got that much time left!
Q. ... I take it that you can release these probationary employees within the 30 days and you won't get a grievance from the union.
A. That's correct. They have absolutely no protection from the union within that 30-day period.
Q. Now, what happens after the 30-day period if you try to get rid of an employee?
A. It's the story of your life after that. They have a good contract, let's put it that way. You have to be very careful of what you're doing, the reasons being that, after the 30 days, they come under the full wing of the Teamsters, and they're very, very well protected. You've got to catch them drunk. Then you've got to prove it, or catch them drinking, then you've got to prove it; or if he's going to have a fight with somebody, or something like that, for him to be totally dismissed - you work under the reprimand situation where, if a guy does a bad job, you will reprimand him either verbally or a few days off. Then, when he reaches three reprimands, you can then tell him "So long" but they've got to be valid. All right? So it's a total different ball park.

Whether the apprehension I have mentioned is justified, and whether such reactions to it are fair in some broader social connotation, is not the issue. Moreover, the matter of fairness in this context has nothing to do with race, colour or any of the other bases upon which discrimination in employment is prohibited. If management has an unduly itchy trigger finger in its assessments of probationary employees then, unless it aims only at members of groups identified by such criteria, redressing "unfair" or wrongful firings is a matter of contract law, not of human rights legislation. In saying this, I do not intend to imply that the respondents acted in any way unfairly towards the complainant.

The apprehensions to which I have alluded were expressed by

Mr Galligan in the following way when asked to comment on Foreman Hladysh's notation (made in reference to the complainant) that "His actions dictate that he would slow down after probation":

> ... most people put their best foot forward on probation and what we are seeing is some percentage above what they normally give to impress us and they would [once over their probation] slow down to their normal. If a person is a super star slowing down to a normal is of no concern. If somebody is quite slow, slowing down beyond quite slow is a real concern. [See p. 2431.]

Indeed, Mr. Challenger was really expressing the same point when (at p. 267) he said that, being on probation "I just tried to go a little bit faster".

I turn now (at last) to a detailed consideration of the five issues outlined above in relation to the allegation that the respondents infringed the complainant's right in contravention of s. 4(1) of the Code.

A. Whether the Complainant was hired as a Diesel Mechanic

It would appear to have been Mr. Challenger's contention in the complaint form, and it was certainly his contention in his testimony, that he was hired as a diesel mechanic. This was categorically denied by the respondents who maintain that he was hired as a general mechanic with diesel experience.

The importance of this distinction would appear to be that, if Mr. Challenger is correct, he should have been given diesel work exclusively, or at least evaluated on that work only, whereas he was given work to do on gas engines as well which formed part of his evaluation. Mr. Galligan testified that one of the reasons for his decision was that the complainant "did not

have a wide variety of general repair experience on medium and light duty trucks." (p.2408.) In the final analysis, however, this much-belaboured point seems to have been of very little significance. Indeed, at one point Mr. Challenger testified that he had no complaints, either at that time or in retrospect, about the kind or type of work assigned to him at the Centre (p. 427). Although he later qualified that statement, he did so in a manner that makes clear the ultimate irrelevance of the assertion that he was hired as a diesel mechanic.

One of the key elements of the complaint was that the other probationary employee hired at that time (Mr. Bob Bartlett, a white man who completed his probation successfully) was given preferential treatment. One assertion made in substantiation of that contention was that Mr. Bartlett had it easier because he was working on smaller gas-powered vehicles, and the following exchange occurred between Mr. Challenger and me (at p. 911):

> THE CHAIRMAN: You felt perfectly competent to work on the gas engines?
> THE WITNESS: Yes.
> THE CHAIRMAN: And you would like to have done that work?
> THE WITNESS: Yes, sir. If I can do it; if I can get it. There's nothing there to do.

Having regard to the terms of the advertisement and to the evidence of both Mr. Galligan and Mr. Hampson relating not only to what was said but to the cyclical character of the diesel work to be done, I am convinced that Mr. Challenger was hired as a general mechanic with diesel experience. Indeed, Mr. Challenger's own evidence is not inconsistent with the respondent's position,

as the following statements made by him show:

> [Mr. Hampson] said to me: "What work you do?" I said "Mechanic". he said "What you do?" I said "General". He said he's not looking for no general mechanic right now because we have enough, we want a guy interested in diesel. (p.84.) ... He [Mr. Hampson] was concerned about diesel mechanic because he said he has got a lot, got some trucks coming through now, customers ordering trucks with Cummins diesel in it, and much guys in there have Detroit experience but they don't have Cummins experience and they are looking for guys. (p.86.)

Obviously (at least in respect of one of the three positions advertized) the Centre was looking for a mechanic with diesel experience, and a general mechanic without that experience would not do. As Mr. Hampson undoubtedly stressed the need for diesel experience and would have exhibited no interest in employing him until he disclosed that he had such experience, it may be that Mr. Challenger simply jumped to the conclusion that he was hired to do that work exclusively. It is also possible that he was inadvertently led to that conclusion as certain exchanges found in Volume 3 of the transcript that were made in relation to the following paragraphs of the complaint might suggest:

> 1. On or about March 5, 1984 I commenced my employment as a truck mechanic with [the Centre]. I was specifically hired to work as a diesel mechanic as I was qualified in this particular area of mechanics.
> 2. Although I was hired as a diesel mechanic, I was given jobs on both gas and diesel machines as I was competent to do both jobs.
> 14. [After telling the complainant he could not keep him, Mr. Galligan] went on to say that I was hired as a general mechanic.
> 15. I replied that I was not hired as a general mechanic. As a matter of fact, I said I was specifically told that if I had not been a diesel mechanic I would not have been hired.

The exchanges in Volume 3 to which I referred occurred

during the complainant's examination-in-chief by Mr. Bell (at pp. 276-277):

> Q. ... you say in paragraph 14 [of the complaint] he [Mr. Galligan] told you that you had been hired as a general mechanic. Then in paragraph 15 you say: "I replied that I was not hired as a general mechanic. As a matter of fact I said I was specifically told that if I had not been a diesel mechanic I would not have been hired." Why would he have said that? What did you understand him to mean when he said you were hired as a general mechanic?
>
> A. Well after I file a complaint and I told him that he hired me as a diesel mechanic.
>
> Q. After you filed the complaint?
>
> A. Yes. Then he replied that he didn't hire me as a diesel mechanic, he hired me as a general mechanic.
>
> Q. Did he tell you this on April 27th?
>
> A. Not on April 27th, April 27th was the last night I worked.
>
> Q. So it was on April 30th that you had a meeting with him?
>
> A. That is the Monday.
>
> Q. Did he tell you at that time that you had been hired as a general mechanic?
>
> A. No, he never mentioned that to me.
>
> Q. When did he tell you you were hired as a general mechanic?
>
> A. He didn't actually tell me that he hired me, he told it to Hogan [the Human Rights Commission's investigating officer].
>
> Q. Why would that matter whether he told you you were hired as a general mechanic, and you thought you were hired as a diesel mechanic?
>
> A. Because after I am working on diesel and I have to work on gas and all different kind of thing. So I said I was hired here as a diesel mechanic and I see guys who were hired on diesel and they hardly give him a gas to work on.
>
> Q. Did you think that was fair, or unfair?
>
> A. I think that was unfair.
>
> Q. Why?
>
> A. Because he turned to me and told me if I don't know anything about diesel, within five days I would be out of the shop. That was said to me by Martin Galligan. He told me within a day he can know if I am a good mechanic or not.
>
> Q. Then later you told us he told you you were hired as a general mechanic?
>
> A. Later on he said, he change his mind and said I was hired as a general mechanic.

Q. Why do you understand he said that to you, do you have a reason to understand why he said that?

A. He tried to get himself out of the rope.

Q. What rope?

A. After I file the complaint.

THE CHAIRMAN: Excuse me, what complaint is that?

THE WITNESS: To the Human Rights.

MR. BELL: Q. So this is a discussion that you had with him after you filed the complaint that we are now dealing with, is that correct?

A. Yes.

THE CHAIRMAN: That is subsequent to the events here?

MR. BELL: Yes.

THE CHAIRMAN: There is some confusion.

MR. BELL: Yes, there is some inaccuracy in the complaint in that respect.

THE CHAIRMAN: Or there is some confusion. You [turning to the witness] are telling us when you saw Mr. Galligan on April 30th ...

A. Yes.

MR. BELL: Q. Did he tell you at that time that you had been hired as a general mechanic?

A. No.

Q. He told you that later and after you had filed --- well he told the Commission that, correct?

A. Yes.

Q. What you are telling us in response to what Mr. Galligan or the respondents told the [Commission] during the investigation?

A. Yes, told them he hired me as a general mechanic.

Mr. Challenger's evidence contradicts the formal complaint in a number of its particulars, and it is unclear to me whether these instances are simply the result of confusion. There are many passages in Mr. Challenger's evidence that are extremely difficult to follow, and I could well understand it if the Commission's investigating officer misconstrued some of the statements made to him by the complainant. However, assuming Mr. Challenger's evidence to be correct, it would appear that the investigating officer who prepared the form for his signature invented an April 30th conversation between Messrs Galligan and

Challenger based on the investigator's own subsequent discussions with Mr. Galligan and that the complainant signed the form subscribing to an assertion that he may well have known to be false. Surely when he signed the form he would have remembered the gist (if not the exact words) of his side of the traumatic conversation concerning his dismissal that had occurred only a fortnight earlier.

While I am not prepared to conclude that Mr. Challenger (or the investigating officer) knowingly made a false allegation in the complaint itself, this circumstance deepens the grave doubts as to the reliability of all of his evidence caused by matters already referred to. Moreover, there is yet another statement made by him in evidence in relation to this same allegation that he was hired as a diesel mechanic that I am convinced is false.

In my opinion his assertion that he saw a notice posted in the Centre advertizing a position for a diesel mechanic is simply not credible. The respondents maintained that there was no such sign posted on the bulletin board. Indeed, to the chagrin of the union, it was contrary to the Centre's policy to post such notices on their premises at that time. The respondents' evidence was corroborated in part during cross-examination by Mr. Hassan Yussuff, one of the witnesses called by the Commission. At the time of his testimony he was working for the Canadian Auto Workers Union at its national office in Toronto on leave of absence from the Centre where he had been employed as a mechanic when Mr. Challenger applied there. Mr. Yussuff had been on the

executive of the local union at the time as well. He testified that it was not until the last collective agreement (after Mr. Challenger had left) that the union finally managed to get the Centre to agree to post job vacancy notices in the second floor lunch room, and he stated that the position Mr. Challenger applied for would not have been posted anywhere on the premises of the Centre. During re-examination he was asked: "Is it possible that it could have been done without your knowledge and you wouldn't have noticed it?" He replied, "It's possible." But when asked whether it was likely, he said it was not. He was then asked whether, "if somebody said they saw a sign there, [he] would say that they'd have to be lying". He replied: "No, I couldn't say that, no." (See at pp. 1291-92.) There obviously was no other response that Mr. Yussuff could have given to such questioning and, in my view, that exchange does not alter the corroborative character of his earlier evidence. I do not believe that Mr. Challenger saw the notice he described, and I must conclude that this is another instance in which he did not tell the truth or was badly confused.

The cumulative adverse effect that the foregoing and other inconsistencies in his evidence have upon Mr. Challenger's credibility is immense, and I should state at this point that I am driven by it to regard all of his testimony with a great deal of scepticism. That evidence must be contrasted with the general impression made upon me by Mr. Galligan.

Although the division of responsibility between, and the

relative seniority of, Messrs Galligan and Hampson was not made entirely clear, those aspects of the Centre's service shop business with which we are concerned was (and is) run primarily by Mr. Galligan. I will refrain from repeating Mr. Galligan's impressive personal record as he progressed up the ranks at the Centre, from an apprentice to his present position as its Service Manager, and his involvement along the way in a number of special projects of which some had an international character. There is absolutely no doubt in my mind that he was by far the most knowledgeable of all the witnesses with respect to the truck repair industry, including the Commission's "experts".

In weighing the relative credibility of Messrs Challenger and Galligan I have taken into account that, as one of the named respondents, Mr. Galligan was present throughout the examination of the Commission's witnesses. I kept in mind as well the warning sounded by counsel for the Commission that Mr. Galligan's evidence should be regarded as self-serving. However, while it is trite to point out the potentially "self-serving" character of the testimony of a witness whose rights and liabilities are at risk, that is a proposition that holds true for the complainant's evidence as well. In my opinion, there were no substantial inconsistencies in Mr. Galligan's own evidence, which was given in a relatively forthright way. (Both he and Mr. Challenger became rather "testy" at times during cross-examination, but not without some degree of provocation.) The opinion evidence of the Commission's "expert" witnesses did nothing to lessen Mr.

Galligan's credibility, and that of its other witnesses is either reconcilable with Mr. Galligan's testimony, or unbelievable for reasons that shall be seen.

B. Whether the "Time Tickets" Provide a Complete and Accurate Record of the Time Spent by the Complainant on Various Jobs

Mr. Galligan stated that the Centre's policy with respect to the time tickets was that the mechanics were supposed to "punch on and off" all operations they worked on, other than at the start and close of each half-shift, at which times this was done by the timekeeper in the control tower (as is obvious from the difference in the impressions made by the two time clocks). Where the new operation is a part of the same work order and the mechanic knows that he is assigned to do it, he is expected to write in the w/o number, the operation letter code and his mechanic's number in the next section of the time ticket; otherwise the foreman fills in that information. However, it is the foreman who fills in this information with respect to probationary employees and, since many of them from time to time cause confusion by transposing numerals in the w/o's, foremen often fill in that information for others as well. Moreover, some mechanics will ask the foreman to punch them off one operation and on to another as a matter of convenience, which requests are complied with. In sum, then, Mr. Galligan's evidence was to the effect that the foremen sometimes do punch the mechanics' time tickets for them, but that they do not control those tickets in the sense that the mechanics are forbidden to punch on and off jobs other than on the four occasions mentioned; quite the

contrary. Mr. Hladysh, who is not a respondent, testified that: "The time ticket is punched at the beginning of shift and during lunch hour off and on by the control tower. The rest of the times are punched by the mechanic. The foreman will usually write in the work order numbers."

Mr. Yussuff's evidence was also to the effect that sometimes the mechanics punched their time tickets and sometimes it was the foremen who did. Although it was his recollection that the foremen did most of the punching during the day shifts, he did not state that the mechanics were not supposed to punch their time tickets. I find that his evidence is not inconsistent with that of Mr. Galligan on this point, and it certainly does not support the contention that the foremen controlled these tickets.

Most of Mr. Challenger's evidence regarding this matter has already been examined at length. He maintained that the only times he punched his time tickets were on the four occasions each day when in fact he could not have done so. Mr. Dehaas, on the other hand, testified that he never punched Mr. Challenger's time ticket.

As was seen, the complainant was badly confused about this matter, and confused, mistaken or untruthful about others, and I would not be prepared to accept his evidence regarding this point if unsubstantiated. This leads to an examination of the evidence of Mr. Aston Brown concerning the time tickets and other matters that go to his credibility.

Mr. Brown is a black man who worked at the Centre sometime

in 1981. He was dismissed before the completion of his probationary period there, the reason given having been that he was too slow.

The examination-in-chief of Mr. Trevor Radway, another of the Commission's witnesses, had to be interrupted so that I could speak to Mr. Brown. As matters stood, it appeared that there would be insufficient time to complete the evidence of Mr. Radway that day so as to get to Mr. Brown, whose attendance even under subpoena had been sufficiently difficult to arrange that I was asked to explain to him his obligations. Mr. Brown expressed to me his determination to defy the subpoena rather than return the next day. In the end, rather than risk losing evidence that was expected to be of major importance to the case of the Commission and the complainant, and with the concurrence of counsel for the respondents, Mr. Radway was asked to step down and return the following day so as to accommodate Mr. Brown.

Mr. Brown's bitterness towards the respondents appears in other parts of his evidence in addition to the following exchange, which occurred some time after he had already identified Mr. Dehaas in relation to a particular incident:

> Q. Did you ever speak with - by the way, who was your foreman?
> A. That old guy over there.
> Q. Mr. Dehaas, are you referring to?
> A. I don't know. Whatever his name.
> Q. Did you ever approach ...
> THE CHAIRMAN: Just a moment. Who was your foreman? The gentleman sitting here?
> THE WITNESS: I don't know wether he's a gentleman or not.
> MR. GAVRAS: Q. Okay. This individual here or this individual here?

A. That man over there.
Q. Back here?
A. Bill.
Q. Bill Dehaas.

Nowhere is it stated in the evidence of Mr. Brown that he encountered any difficulties at the Centre on account of his colour, and he appears to cast as much blame for his failure to succeed there on the unionized workers in the Parts Department as on management. He indicated that it was very hard for anyone to successfully complete probation "if they don't want you to make it there" because, "to begin with, all the jobs were more or less time limit". Why it was that anyone would not have wanted him "to make it there" he does not say. In any event, his evidence continues as follows (p.1332):

> ... You sometime get a job, for argument's sake, and they want you to finish it in two hours, but you go to the Parts Department to pick your parts up, and it takes you an hour and a half to the same piece of parts and they're still expecting you to finish it in half an hour. ... And, secondly, the guys at the Parts Department, their attitude was that they are doing a night's work and they don't care. If you don't want to wait for the parts, leave it. You stay there and you wait for an hour, hour and a half and, by the time you get the parts, you still have only ten minutes to finish the job, and the foreman is after you why you didn't finish it - you didn't finish it in time. ... [It is n]ot that they don't have it [the part]. Most of the time they do have, but the attitude of the guys that work in the Parts Department, "If you can't wait, you can go to hell" type of thing like that, because "I'm unionized worker" so "You're trying to make it into the union." You stand like 99 to 1 chance. You didn't get your parts. I was told that, You could go to Chinatown, in the amount of time they told me that, I would be speaking Chinese right now. What I was told every time I go there. You stand and wait and wait and wait.

The respondents testified that both the time required to

bring a vehicle into the shop and to get parts needed for repairs are normal aspects of the operations to which they relate and are taken into account in determining the time allowed for the job. It was their evidence as well that the mechanic should report to the foreman so as to be clocked off a job where a substantial "parts tie up" occurs so that he can be given some other assignment in the meantime. This would seem to be supported by common sense. After all, the Centre cannot charge the customer for the time involved in a parts tie up and, if the mechanic is simply standing around waiting (as Mr. Brown said he invariably did, sometimes for as long as an hour and a half), the Centre is losing money. The mechanic could have been working on another job at the billable rate of $44 an hour and, according to what has already been seen, at the current net profit rate of $2.70, that hour-and-a-half would represent the net profit on three full shifts of a mechanic's time. Thus, I have no doubt that Mr. Brown greatly exaggerated the delays attributable to parts tie ups.

Mr. Brown referred to three specific incidents in which he felt he was made to take more time on the job than necessary. The first was his allegation that, owing to Mr. Dehaas's ignorance and obstinacy, he was made to use a small mirror to see an obscure area on which he had to work, thus taking eleven hours to complete a job which he said he could have done in three hours by other means. He later increased his level of competence by saying that he was capable of doing it in two hours. There was no documentary evidence relating to this rather anecdotal testimony

to show what the time allowance had been and how long it actually took to do it. But the technical explanation given later regarding the particular kind of operation satisfied me that it was the only appropriate way of going about it. (See pp. 2144-2146 and pp. 2677-2678.)

I must say, as well, that I find it completely incredible that this very large enterprise, working in a highly competitive market on the basis of tremendous volume and a small hourly net profit, and (or) any of its managerial staff who are ultimately accountable to its auditors, would deliberately manoeuvre a probationary employee (whether black or not) into incurring an eight or nine hour overrun as an excuse to fire him. If I have properly understood Mr. Galligan's explanation of the Centre's net profit rate, the loss on that operation alone would be the equivalent of well over three weeks of a mechanic's time. And this would be added to all the other overruns which the witness alleged were falsely attributed to him, such as parts tie ups. It may be observed that the extent of the cumulative financial loss to the Centre thus described would not only be bound to attract the baleful attention of its auditors, but it would be a ridiculous piece of overkill.

In considering this particular allegation of Mr. Brown it should also be remembered that it is the service adviser who sets the time allowed for a job. If in this instance he had set it at 2 or 3 hours, then Mr. Dehaas would have had a lot of explaining to do regarding the overrun. And if the service adviser (who

would no doubt have to be labouring under the same ignorance as that attributed to Mr. Dehaas) had set the allowable time at 11 hours, then there would not have been any recorded overrun to hold against Mr. Brown.

Of the other two incidents referred to by this witness, one related to automatic transmission work and the other to a dispute as to whether an engine should be removed. All that need be said about Mr. Brown's evidence regarding those incidents is that it was effectively countered by the evidence of Mr. Galligan (pp. 2140-2148).

We now come to Mr. Brown's evidence regarding the time tickets (beginning at p. 1336):

> Q. Can you tell me - did you punch on and off?
> A. Well, okay, that's another thing. I notice that my last month - the last month I worked there or whatever - some days, you know, before I was called in and dismissed, Some evenings when I go to punch my card or some days that I look in - particularly in the holder for the card, mine is missing; so I would go to Bill Dehaas and say to him, "I haven't seen my ticket." And he says, "It's okay." He took it. What he took it for I don't know. He do whatever he want to with it. Then he come back and say, well, I did take long. And whenever I finish a job, he didn't punch it off. He kept it and let the time run some more, so it look like I take 6 hours to do it when in truth, in fact, I did finish in three hours. That's what he used to do to me.
> Q. When you came in in the morning, did you punch in?
> A. Yeah, I punch in.
> Q. You punched in.
> A. I would punch in on a job and then, after a while working, ticket is missing when I'm finishing it. Ask for ticket. It was never there. He has it some place. I don't know what he was doing with it. That's why mess up people's times; so my time especially. I can't talk for anybody else. ...
> Q. Could you clock off that time that you were waiting to get your parts?
> A. If I was instructed to do so, I would.

Q. Were you instructed to?
A. No, I wasn't instructed to punch off anything.

Mr. Brown's evidence is far from clear, which lack of clarity cannot be visited upon the respondents, of course. At the outset, he appears to indicate that the alleged problem period with the time tickets was in the last month - only some days before his dismissal. He answered affirmatively to the question whether he punched in when he came in in the morning. If the reference were to the time tickets (as opposed to the cards), and if what was meant was "first thing" in the morning, then this could not have been the case. Mr. Brown then indicated that "he" (not the foreman) would punch in on "a" job upon the completion of which he would look for the time ticket in its holder. Since it was he who punched on, such jobs could not have been the first ones in the morning for which the control tower punches on all the mechanics. In any case, why would he go to get his time ticket in its holder and, upon (allegedly) finding it missing, ask for it? What could he have wanted it for except to punch off on it? How could that have been his intention if the foremen always punched these tickets? Why did he indicate that a mechanic could punch off during a parts tie up if authorized to do so? Is that not consistent with the respondents' evidence that mechanics were to advise their foremen of parts problems so that they would be clocked off?

Mr. Brown's testimony, having been given seven years after he was dismissed from the Centre, his vague and unsubstantiated accusations could not be dealt with by the respondents through

the analysis of w/o's. Nevertheless, his evidence is such as to lead me to conclude that he was at best confused. As has been noted, some time towards the end of each half-shift the timekeeper removes all the tickets to the control tower. Had Mr. Brown looked for his ticket during that time it would, indeed, have been missing. Perhaps that might explain his confusion as to the time tickets. In any case, I have concluded that the evidence of Mr. Brown is not such as to substantiate Mr. Challenger's allegation that the foremen did all the punching on his time ticket.

Mr. Challenger also alleged that he had been refused permission to clock off jobs he had completed so that time was improperly recorded against him. The only instance that he gave of this was with respect to w/o 21266, which we will come to in due course in another connection. In the present context, however, Mr. Challenger said that he had been taken off w/o 21266 and told to work on a "Hino" truck (a Japanese-made vehicle), and that while doing so time was still being clocked against him on w/o 21266. The evidence subsequently made it abundantly clear that the Hino job in question was w/o 21106, and that the complainant had clocked off w/o 21266 and on to 21106 at exactly 14.8 (which is 12 minutes to three), and that he was never clocked on to w/o 21266 again. Clearly, no time ran against him on w/o 21266 after he left it to work on the Hino.

It was also Mr. Challenger's submission that his time on jobs was artificially inflated by the inclusion of the time it

would take to get a truck into the bay in order to start work on it and the time it took to get parts for it. The respondents' evidence was that these activities are a normal part of the job for everyone. The foremen as well as all the mechanics must live with that aspect of the flat rate system, exceptions being made for substantial delays involved in getting a vehicle in, or in getting parts for it.

Messrs Calligan, Dehaas and Hladysh were questioned closely and quite aggressively in relation to the w/o's upon which Mr. Challenger was found to be slow. As it turned out, the number of such w/o's involved was not great; but the evidence concerning them was voluminous and repetitive.

In endeavouring to show that the respondents lacked any proper, reasonable or objective basis for the decision to dismiss the complainant, counsel for the Commission attempted to narrow the focus of inquiry to the shortest period possible in order to reduce the number of incidents of alleged incompetence that would have to be countered. Since Mr. Challenger's first evaluation had not provoked a negative reaction from Mr. Galligan, it was suggested that nothing that occurred before March 18th should be seen as relevant. And unless there was an adequate basis for the April 12th decision to dismiss the complainant, then that decision would be subject to the inference that it was racially motivated regardless of what subsequently transpired. Counsel for the respondents vigorously opposed that suggestion, referring in argument to the April 12th date as an artificial barrier. I agree

with that contention.

In my view, Mr. Challenger's entire performance during the course of his employment at the Centre is at issue. Although there was nothing in the March 18th evaluation to cause Mr. Galligan to conclude that the complainant should be let go so soon after starting, it does not follow that that period of employment must be ignored when assessing the candidate later on. Of course, the fact of the matter is that the complainant was not dismissed on April 12th. He continued in his employment at the Centre until his dismissal on April 30th. And that is not simply a matter of semantics.

Although when he called Mr. Challenger to his office on April 12th Mr. Galligan felt that he had fair and reasonable grounds to dismiss him, their conversation clearly persuaded him otherwise. Obviously, he would not have given the complainant a second chance unless he had had second thoughts. Some element of doubt must have entered his mind. Are we to assume that the General Foreman was so machiavellian that, in addition to having trumped up charges of pre-April 12th incompetence to cover the real reason for firing the complainant, he <u>pretended</u> to give the complainant another chance in order, firstly, to extend his opportunity to fabricate more false evidence and, secondly, to assure that he would look good should the matter ever be examined in some open forum? Of course, no such suggestion was made by counsel for the Commission.

Ironically, while resisting the respondents' right to rely

on the documented evidence of Mr. Challenger's post-April 12th performance, counsel for the Commission argued that the quality of the complainant's performance after leaving the Centre was most relevant. The suggestion was that his performance after departing the Centre was so good as to indicate the unlikelihood of its having been unsatisfactory while he was there. (Of course, the quality of that subsequent performance was left largely to be inferred from his resume, to which considerable reference has been made already.) However, any evidence of unsatisfactory performance during the last two weeks of his employment is entirely irrelevant. It is to be disregarded even in the context of shedding light on the earlier performance. I find that suggestion unacceptable, as did Mr. Galligan in his clear and cogent response to it (see pp. 2263 ff.).

On two occasions counsel for the Commission picked up on what I am convinced are understandable mistakes, equivalent to typographical errors, in the separated white perforated time tickets attached to w/o's. One is w/o 21551, in which the mechanic's number was changed from 55 to 53 (see p. 2279). The other is w/o 21266, in which the number 23 has been changed to 53 (see p. 2848.) However, an examination of exhibit 59 immediately dispels the suspicion of tampering that may counsel for the Commission sought to raise.

As has been pointed out, the second copy of the time ticket is made of hard buff-coloured paper, and the information entered on the removable sections of the white front copy of the time

ticket remains intact on that buff copy. It is the record of everything done by the mechanic whose time ticket it is. Since Mr. Challenger's permanent work production time tickets (found in exhibit 59) show the identical errors, it is obvious that a wrong number was accidentally entered. It was probably corrected on the spot. This is borne out by another error that counsel did not pick up on. There was a w/o 20769 on which the complainant worked and we find in the box for the mechanic's number the first three digits of the w/o "207". These are the kinds of simple errors produced by those mental lapses to which nearly everyone is subject.

In the course of his argument, counsel for the Commission returned to the matter of the number 55 having been changed to a 53 on the separated section of the white copy of the time ticket attached to w/o 21551. After quoting the explanation provided by Mr. Galligan, who had concluded that "the original buff should show exactly the same as what these show", counsel remarked that this was "Again, another assumption; <u>should</u> show". Well, of course, it <u>did</u> show the same correction.

My review of this aspect of the evidence convinces me that none of the foremen exercised exclusive control of the time tickets, that Mr. Dehaas did not fraudulently, maliciously or otherwise manipulate the complainant's time tickets, and that the information shown on the various time tickets attached to the w/o's entered as exhibits are an accurate record of the time spent by all the mechanics involved in the operations to which

they refer.

C. Whether the Recorded overruns were Properly Attribute to the Complainant

Counsel for the Commission argued that the only evidence of any objective basis for Mr. Challenger's dismissal that was even remotely credible consisted of w/o 21409 and w/o 21266. Although these were in fact the only w/o's between March 18th and April 12th that purport to document the complainant's slowness, they happen to constitute a considerable percentage of the total time he worked during that abbreviated period. Of course, there were two other relevant w/o's falling outside that period as well: w/o 20634, which was prior to March 18th, and w/o 30377 in the final two weeks. Also of relevance is w/o 21025, which Mr. Dehaas noted on the back of his second evaluation, along with other w/o's, in response to Mr. Galligan's request for particulars.

Before dealing with documented dilatoriness, it is to be observed that it was in respect of w/o 21025, which entailed a major repair not involving an overrun, that Mr. Challenger complained of harassment through being told that he was too slow and by being pushed to hurry up in order to get the job completed within the time allowed. Mr. Dehaas readily admitted urging the complainant to work more quickly, and he testified that he did so in order to avoid an overrun which he felt would otherwise have occurred. Surely a foreman is entitled to form opinions as to how the work he is supervising is progressing, to issue instructions and take such other actions as may seem appropriate in order to assure that it is completed in a timely and satisfactory way, and

to report his concerns to his superiors, particularly as they relate to a probationary employee. And surely those concerns are relevant in the decision-making process. Mr. Dehaas said that he noted that particular w/o for that reason, and I would take that to be a quite legitimate concern. Mr. Galligan, was not trying to determine the complainant's guilt beyond a reasonable doubt in respect of some accusation of misconduct. He was merely trying to determine whether to offer him permanent employment, and he was perfectly entitled to rely on his foreman's judgment in that regard as part of the cumulative record he was examining.

When explaining "the type of investigation we follow on owner-pay low gross and warranty low gross", Mr. Galligan provided a carefully detailed analysis of w/o 21409 (running from p. 1801 to p. 1818), which involved a "crankshaft rear seal". Extensive testimony by him on this matter is to be found elsewhere in the evidence as well.

The truck involved in this w/o was not under warranty and "because of the age and vocation of the vehicle", he said, "we've been able to justify an 80% overrun on the flat rate time. Most likely we quoted [the customer] four hours. We could justify 4.5. We certainly would not try to justify six-point-something. He may pay it but he would never come back." (See p. 1804.) In fact, it took 6.7 hours to complete the job and it had to be "low grossed" to 4.5 hours, resulting in a 2.2 hour overrun that had to be written off.

The work on w/o 21409 was begun on the night shift by Mr.

Bartlett (the white probationary employee) who spent 1.8 hours on it. The night foreman, Mr. Hladysh, testified that "Mr. Bartlett brings the vehicle in, steam cleans the under area, pan, transmission, removes the oil pan, removes the rear bearing cap and removes the rear main oil seal, inspects the crankshaft for a groove in it and then he orders the rear main seal." He did not complete the job, which Mr. Hladysh said was then half over, because there was a parts tie up. (See p. 2958.) This would certainly seem to indicate that Mr. Bartlett was not responsible for the overrun, since 1.8 is less than half of the likely time quoted to the customer and considerably less than half the low gross allowance of 4.5.

The vehicle was then removed from the garage, in all probability to make room for the next shift to work in (see p. 1810). In any case, when Mr. Challenger took over the job the next day he had to go and get the parts which, in Mr. Galligan's opinion would ordinarily take approximately .3 hours (p. 1813). He also had to get the vehicle back in, which the documents show would have taken at least .7 hours (i.e., 42 minutes). In fact, according to Mr. Galligan's analysis, it might have taken (at the most) another .4 for a total of 1.1. In analyzing the w/o to determine responsibility for the overrun, that additional 24 minutes, would appear to have been a most generous estimate in the light of Mr. Challenger's own evidence that he spent "about forty-five minutes out in the yard" getting the vehicle in. (See p. 233.)

Mr. Galligan was cross-examined rather aggressively with respect to this w/o (as he was regarding the others as well), but his view that Mr. Challenger was responsible for a substantial overrun on this job remained firm, and I found his evidence most cogent and fair. His analysis made reasonable allowances for the delays that any mechanic in Mr. Challenger's position might not have been able to avoid, including orienting himself upon picking up where someone else had left off. Obviously, his evidence on this matter was based strictly on his analysis of the w/o, as he was careful to point out time and again. He could not possibly have had any direct knowledge of each and every action taken by the mechanics in the course of carrying out their work, as counsel knew full well when questioning him. And, although he chided Mr. Galligan repeatedly for his reliance on "assumptions" and "expectations", counsel made use of such parts of that evidence as he could. As it conveys the flavour of the entire cross-examination, it is rather instructive to review some of the exchanges regarding this particular w/o (beginning at p. 2533 of the transcript):

> Q. How long was involved in the delay in getting- in your view, sir, - in getting the vehicle into the shop and into a position where Mr. Challenger could work on it?
>
> A. To get everything and to get to the point where he knows what he is doing and he is about now to complete the repair - an hour and a half.
>
> Q. Did you have any complaints or any concerns about Mr. Bartlett's performance in the 1.8 hours he took to do his part of the job?
>
> A. No, in the sense that Mr. Bartlett went and got the truck originally, I can assume he did the diagnosis because he removed the crankshaft rear seal.
>
> Q. You don't <u>know</u> - or did you talk to Mr.

Bartlett about that?

A. He took the seal (I am going to the work order) he took the rear seal off, so he did some determination that the crankshaft rear seal was leaking and he took it out and went to get a new one. They did not have a new one. He ordered the part and that is all I know about Mr. Bartlett's input to this job.

Q. Is it 4.5 hours to do the whole of operation A?

A. All I am saying is what we charged the owner and that is totally what we could justify on the job.

Q. So you are saying that approximately 40% of that would be diagnosis? 1.8 hours?

A. Diagnosis?[The answer was delivered with understandable bewilderment.]

Q. That is diagnosis and dismantling?

A. They took it apart. Yes, he took it apart.

Q. In your opinion, sir, that is a fair time?

A. I would imagine so, yes.

Q. You would <u>imagine</u> so?

A. That would account for about 45% of the job, so if an additional 55% were put on this job it would have come in at less than 4 hours. To clean it, diagnose it, take it apart, is about 40 to 45 % of the job, and that is 1.8 hours. If Mr. Challenger had taken 2.4 hours on the job we wouldn't have had a problem with the job.

Q. Okay. If it took longer than an hour and a half to get that vehicle in and get the parts to do - Could it have taken longer than an hour and a half? Mr. Challenger's evidence is it did.

A. I don't know how Mr. Challenger would substantiate that and here is my reasoning. Mr. Challenger clocked on the job at 11.1 on April 6th according to the time tickets. He probably went to the parts department to get the crankshaft rear seal because his evidence was he was not aware that the truck was in the yard. He assumed it was in the shop. So he went to get the part ...

Q. We don't <u>know</u>. These are all <u>assumptions</u>.

A. Mr. Challenger made that statement, sir.

Q. You are saying "I <u>assumed</u> this and I <u>expect</u> that". What do you <u>know</u> happened?

A. I know Mr. Challenger clocked on this work order on April 6th at 11.1

Q. What did he do at that time? - To your <u>knowledge</u>, not to your <u>assumption</u>.

A. I have no knowledge of what Mr. Challenger ...

Q. Fine. You have no knowledge. [This being stated sarcastically.].

A. That is right.

Q. It is Mr. Challenger's evidence, as I understand it, he was clocked on and he was sent to find the truck which was out in the yard?

A. Fine. Can I finish what I was saying and then you can correct me on it?

Q. That is your assumption ...

A. That is exactly what I was going to say if you let me finish. Up until 12 o'clock that truck was not in the shop and I know that because ... [and the evidence goes on in similar vein until, at p. 2539] ...

Q. Why do you assume that [Mr. Challenger went for parts]?

A. Because the work order was tied up, and so was the truck, for parts. The first thing you do when you are a mechanic and get a work order calling for parts, you go and get your parts, you come to the job. In this case there was no job to come to.

Q. You don't know, do you?

A. Of course I don't.

Q. So he loses 1.6 at least?

A. Not at least. ... [spoken with some degree of exasperation in light of the lengthy explanations given already by the witness] ...

Q. .9 and .7 ...

A. ... Look at the documentation. Not the least, the most!

Despite Mr. Galligan's clear and firm evidence on this, counsel for the Commission made the following statement in argument (at p. 3188):

> ... the vehicle was dead out on the lot and had to be dragged in and, as I recollect, Mr. Galligan's evidence even is that it took upwards of two hours to get that vehicle in position to enable Mr. Challenger to work on it, and if you don't hold him responsible for that time, and I submit any fair-minded person would not, then it may be as Mr. Eland and Mr. Majeau both testified - were both of the opinion - that there was no overrun, or if there was an overrun, it was a slight overrun. [Emphasis added.]

Of course, Mr. Galligan said that the excusable delay was one and a half hours at most, including 1.1 to bring the truck in, while Mr. Challenger's testimony is that the delay in getting the truck in was some twenty minutes less than Mr. Galligan was prepared to give him credit for. As counsel for the Commission indicated in another connection (see below), "Mr. Challenger was

there. He knows what he did." And Mr. Challenger says he took 45 minutes to get the truck in. As to the reference to Messrs Eland and Majeau, I shall come to their testimony presently.

Counsel for the Commission submitted that the blame for any unjustifiable overrun on w/o 21409 should have been shared by the two mechanics who worked on it. He asserts that what Mr. Bartlett did for his 1.8 hours is inference and assumption, and he goes on to ask (at p. 3189):

> Why didn't we hear from Mr. Bartlett? Surely that would have been the best direct evidence of that. We have Mr. Challenger. He was there. He knows what he did. We had Mr. Eland and Mr. Majeau and their assessment and I submit that their evidence is far preferable to the evidence of Messrs Dehaas and Galligan on the issue of the overrun, the alleged overrun, on 21409."

In my opinion, it was clearly not up to the respondents to seek out Mr. Bartlett (who no longer worked at the Centre) in order to question him as to what he did. It was for the Commission, surely, to call Mr. Bartlett if it felt that his evidence would reveal that he was partly to blame for the overrun. The Commission raised this issue in cross-examination and got nowhere with it, and it was not thereafter up to the respondents to seek out Mr. Bartlett to discover whether he would deny an allegation that was simply conjecture on the Commission's part.

In the same vein, it is interesting to note that it was the Commission that introduced a great many of the w/o's on which Mr. Bartlett had worked with a view to establishing <u>in his absence</u> that he was inferior to the complainant and that, since he had

completed his probation successfully, the complainant must have been discriminated against on account of his colour. Surely Mr. Bartlett's testimony would have been the best direct evidence of what he did respecting the w/o's that the Commission introduced! He was there. He knows what he did. But counsel for the Commission did not see fit to call him, or to lead any direct evidence in this regard. Instead, the Commission put the respondents through arduous hours of cross-examination on these additional w/o's, the analysis of which would obviously have to be based on "assumptions" and "expectations" to the same extent as for any of the others, thus enabling the disparagement of inconvenient replies.

Be that as it may, it is obvious that Mr. Galligan's assessment of the w/o's is no more a matter of inference and assumption than that of the Commission's experts. Obviously "Mr. Challenger was there" when doing his own work. However, he was not there when Mr. Bartlett was working; but Mr. Hladysh was! He was the supervising foreman on duty at that time. His evidence on this, which was <u>not</u> based upon assumptions and inferences, and which went unchallenged, specified exactly what was done by Mr. Bartlett on the night shift; and according to that evidence the job was half over when Mr. Bartlett clocked off.

I turn now to the opinions of the "expert" witnesses. The w/o's that were sent out by the Commission for "expert" assessment were provided by Mr. Galligan at the time of the investigation as a basis of discussion and in anticipation of an

opportunity to expand upon and explain them. That opportunity never arose, and it was these very incomplete documents that the Commission obtained "expert" reports on.

Mr. Majeau is a man of extensive "hands on" experience in the trade. He is the Central Region Maintenance Manager of Kingsway Transport where, after starting his employment as a mechanic, he progressed to assistant foreman, foreman and garage supervisor, and then to his present position.

Mr. Majeau's evidence was as surprising as it was revealing. Time and again when taken through the full documentation during cross-examination he concluded that the complainant had been slow and acknowledged that the w/o's that had been provided for the purpose were in fact fair comparisons.

With respect to w/o 21409, Mr. Majeau concluded that "if the pan is off ... [as it most definitely was] ... he [Mr. Challenger] fell asleep on the job." (See at p. 1205.) On w/o 30377 "he took too long" (p. 1177) and "he's a little high" (p. 1217). With respect to w/o 30052 (which was after April 12th) he said that Mr. Challenger "took too long on the job" (p. 1189; and see at 1190-91 as well). And so it went. Indeed, his evidence was such that one would think Mr. Majeau was one of the respondents' witnesses. Nevertheless, counsel for the Commission not only invoked his name frequently as someone whose supposedly damning testimony is to be preferred to that of the repondents but, as shown, attributed to him views he did not express.

Although counsel for the Commission undoubtedly regarded Mr.

Eland as one his most important witnesses, it is my opinion that his evidence was almost totally discredited by Mr. Galligan and (ironically) the other Commission expert, Mr. Majeau.

Mr. Eland's background involved little (if any) professional experience as a mechanic, and he had never personally done the kinds of repair work in question. His "expertise" was as to the "applications" of vehicles. He was a self-described "applications engineer" whose forte was to identify the most appropriate vehicle for particular purposes. He said that he had also "pioneered" the use of certain equipment while working for a particular company. This turned out to have had nothing to with inventing or designing the equipment, but to having been involved in the selection and purchase of equipment not previously used by his employer.

Mr. Eland, like Mr. Majeau, lacked essential information when he wrote the report that was the basis for his examination-in-chief, and one might have expected at least some semblance of readiness on his part to adjust his views at the hearing in light of new information, as did Mr. Majeau. However, Mr. Eland exhibited a partisan and inflexible attitude that seemed to compel him ardently to resist any suggestion that the conclusions in his report should be altered. As was observed by counsel for the respondents, "he was an advocate and not an expert."

Mr. Eland began by asserting that the manufacturers' flat rate times are notoriously low, that they are consistently 20% higher than the normal times it takes to perform the operations

in question. Consequently, he did not even bother to consult these schedules in the preparation of his report. He thought he had a better guide on which to rely, namely, the "Motors" manual. Mr. Galligan, who was not cross-examined on this, had the following to say about that manual (at p. 1783):

> "Motors" are an automotive after-market company that-they publish repair manuals - How to fix your Toyota, How to fix your Volkswagon - they're in that fringe of the automotive business that caters to the small garage that is not a manufacturer-related business. The corner gas stations that are Jack-of-all-trades in the business and that do not get the appropriate service manuals for every vehicle built ... Recognizing this, "Motors" have published a manual ... but they do not time-study it. What they do in effect is they take the published flat rate time from the appropriate manufacturer and they add approximately 20% across the board to it.

Mr. Galligan said that the time allowances set out in the manufacturers' flat rate manuals used by the Centre (and other dealers) are tight, but far from impossible to attain, as was in fact clearly demonstrated during our close examination of the many w/o's dealt with at the hearing. Indeed, the self-defeating character of so grossly underestimating the time required to effect various repairs on vehicles and engines that are under warranty seems to me readily apparent. If repairmen consistently had to take a 20% loss on warranty work, they would have to refuse such work or go under. If no one would effect repairs to products under warranty, the warranty would be valueless. Without adequate warranties, sales would not be made and the manufacturer would go out of business.

Mr. Eland's testimony on w/o 21409 showed that he was

confused, and Mr. Majeau actually says that the time taken was excessive!

On w/o 21266, Mr. Majeau acknowledged that the total time allowed for the job was fair and that there was an overrun. Mr. Eland was again confused. Everyone else who testified about this w/o (including the complainant) knew that the job was an "in frame" or "in chassis" overhaul. Mr. Eland thought that it was out of chassis. A note on the w/o indicated that the engine was "soaking", and this appears to have been the (or a) reason for his confusion. He assumed that the engine had been taken out to soak in some liquid. What the note referred to was the fact that the engine was covered with a special shampoo.

Mr. Eland was mistaken in respect of another important aspect of this w/o as well. The truck was a cab-lift vehicle, the entire hood and cab being hinged at the front so as to be able to swing out of the way, leaving the radiator as the least accessible part. The note attached to the w/o showed that the cab would have to be "lifted somehow to get the rad out". Mr. Eland thought that the cab had to be lifted in order for Mr. Challenger to do the work in question, and he concluded that that task would account for a substantial part of the complainant's time on the job. In fact, the cab had been raised sufficiently for the in chassis overhaul, and that notation referred to the extra lift required to free the radiator for the purpose of another operation.

At one point in his evidence Mr. Challenger was asked

whether, "if the work order says to replace a throw-out bearing and check the clutch ... the first thing you would do in terms of the operation would be to remove the transmission to take out the throw-out bearing?" After giving the answer "Right", he was asked if he would then remove the clutch from the flywheel in order to check it, to which he replied "Well, to get a good visual look at the clutch it makes sense for you to remove the flywheel." (See pp.424-425.) When Mr. Eland was questioned about this operation and asked whether "a good mechanic would unb and remove the clutch from the flywheel in order to inspect the clutch", he said that he "would be very surprised" if that were done. (See pp. 1082-1083.)

There is simply no point in going into the lengthy evidence that shows that Mr. Eland's opinion that the comparative w/o's were not truly comparable did not hold up either.

It should be noted that counsel for the respondent asserted at the outset that Mr. Eland lacked the qualifications to give expert evidence, but he did not seek to prevent that evidence from being heard. Rather, that issue was left to be dealt with during argument. It would seem to me that, not having moved for his disqualification as a witness prior to the reception of Mr. Eland's evidence, counsel ought not to be heard to impugn his testimony on that ground in argument. In any case, upon a careful review of all of the evidence, I find that Mr. Eland's analysis of the w/o's is unreliable and that that of Mr. Galligan, supported as it is in several material respects by Mr. Majeau, is

to be preferred. In the circumstances, it is unnecessary to decide whether or not Mr. Eland's evidence is receivable as being that of an expert.

In light of the foregoing, there is only one remaining w/o documenting slowness that should be dealt with further: w/o 21266. Although there can be no doubt that a substantial overrun occurred in respect of this job, since mechanic No. 210 worked on the operation in question along with Mr. Challenger (they were on different shifts), counsel for the Commission suggested that if there was any blame it should be shared. Mr. Galligan explained why he concluded that Mr. Challenger was mainly responsible in this way (at p. 1997):

> So we have two people that started together on an in chassis overhaul ... with what we presume to be an equal distribution of work, although it may not have been. But there is 13.3 hours' difference in the total time that they clocked against the job. ... It looked like a sharing. Whether they did equal work or not I don't know. ... All I do know is that there's 13.5 hours more of Challenger's time than Rougoor's time. With this, I look at the conditions that prevailed, the other information. As somebody said about one of the comparatives, "Obviously a person that knows what they're doing and is well used to the shop and working on 8-V-71s". He was not at that time describing Mr. Rougoor but he could have been because Mr. Rougoor had worked for us for years and we knew what he could do.

It might be noted that Mr. Rougoor (mechanic No.210) worked on one of the comparatives involving the same kind of operation and which was completed within the flat rate time. While Mr. Galligan's reconstruction of events cannot prove conclusively the extent to which the complainant was responsible for the overrun, it certainly establishes the reasonableness of the belief that he

was largely to blame for it. And even if the blame were shared evenly, the fact remains that Mr. Challenger was seriously slow on this job.

There is one final point regarding this w/o that remains to be considered. It was in respect of this w/o that Mr. Challenger stated in paragraph 17 (2) of his complaint:

> I was accused of breaking an exhaust manifold on a truck. This was broken prior to my inspection. The service advisor, John Bromfield was aware of this when the truck was brought to the shop.

Mr. Galligan testified that the complainant was not accused of breaking the exhaust manifold, but of putting it on in a broken condition without informing the foreman. He said that he discussed this with Mr. Bromfield (who is also a black man) and that the latter denied knowing about the manifold. Mr. Challenger said that because neither a new one, nor a sound old one, was available he was instructed to have the manifold welded and to put it back on, and that that was what he did. Mr. Galligan said that the manifold had been removed and put back on broken without any instructions to do so as part of the main operation. He said that the result was that a vehicle that had been repaired at a cost of $7,000 was about to leave the shop making a terrible racket that a twenty dollar welding job would prevent. Therefore, Mr. Galligan said, he gave instructions to take it off <u>again</u>, get it welded, and reinstall it <u>for a second time</u>. (See, <u>inter alia</u>, pp. 1942-1945.) This is substantiated by a cost item in the w/o that would not otherwise have been there. (See at pp.1980-1981.)

Having now considered paragraph 17 (2) of the complaint, the

other part of that paragraph will be dealt with at this point as well:

> I had been assigned to repair a truck. During the course of the job, the truck was removed from the shop and placed outside. I was accused of removing the truck before completing the job.

The w/o involved here is number 30060. It is to be recalled that this was not one of the w/o's that the repondents said they had relied upon, and that Mr. Galligan's evidence is that the general reason for dismissal was a failure to meet the requisite standards through dilatoriness, sloppiness and inexperience in certain areas. It was Mr. Challenger who asserted that the brake line problem was one of two reasons provided at the time. In any case, in reviewing the w/o Mr. Galligan felt that the complainant would have been responsible for the vehicle going out with a hole in a brake line. He attributed responsibility to the complainant because, as the last to work on it, he was responsible for the integrity of the repair. It happened that Mr. Bartlett was clocked on to the same operation afterwards on a different shift. The evidence is rather confused as to whether the operation had two distinct parts or stages to it, for one of which (in the respondents submission) the complainant was responsible and in respect of which he ought to have seen to it that the brake line was replaced. I must say that the evidence of the repondents regarding this matter did not lead me to the conclusion that Mr. Challenger was at fault. However, even assuming that they were mistaken in their assessment of this w/o, nothing points to any bad faith in that regard, nor does this lessen the overwhelming

cumulative weight of the rest of the evidence.

D. The Importance of the Complainant's Employment Record Elsewhere The complainant's resume reveals that he has worked as a mechanic for several employers some of whom promoted him to the position of foreman. The respondents were unwilling to accept the proposition that those who are thus promoted are generally of above-average ability as mechanics. Other witnesses expressed the opinion that foremen would generally be drawn from the ranks of the better mechanics at their establishments.

Mr. Majeau was not prepared to accept a resume as proof of anything. When asked during his examination-in-chief whether he would consider hiring someone with such a resume he replied in this fashion (beginning at p. 1196):

> Well, I can't say no in this case with this type of qualifications, but he'd also go through a probationary period ... You know it's not the Salvation Army running it - a garage ... A lot of people come with this type of stuff you know. They've got portfolios bigger than that briefcase you were carrying this morning and, God, you can be fooled. We've all been fooled at some time or other because of these papers you can get very cheaply. [In fairness to the complainant, I believe the papers referred to were the various certificates rather than the resume of experience.] The man must be able to do his job.

Clearly the value of experience elsewhere is relative, and regard must be had to the character of the garage in question, to its expectations, and to the general level of competence of its mechanics. What is average in one shop may not be in another. The evidence establishes a significant difference between the expectations of "retail service" garages, such as the Centre, and garages such as those in which the complainant worked as a

mechanic and foreman. Here is what Mr. Galligan had to say in that regard (beginning at p. 1832):

> [T]here is no comparison between any fleet garage in Canada and the GMC Truck Centre or any other dealership. ... They do not vie for that business in the open marketplace. They compete with nobody. They don't establish a door rate that suits any purpose other than a fleet maintenance budget purpose. ... They're quite happy to justify their costs to themselves. There's no problem there. It perpetuates the garage and the people that work there, and that's fine. I've got no quarrel with it. As a matter of fact it helps people like ourselves because we can go to them and show them a cost-effective way of doing certain major repairs that they now do themselves and do themselves no justice. ... But as to comparing the efficiency of shops or whether they would be in a position to gauge whether something took too long or too short: first, they do not have the guidelines as to how long it should take, other than what their foreman feels is a fair time for the job; and, secondly, if the mechanic takes 25% more but the truck got out in time, it met it's deadline, everybody's happy. There's no pressure brought to bear on the foreman who, in turn, brings no pressure on his mechanics. So it's uniquely different.

Mr. Galligan's view on this was not challenged. And it found support in the evidence of other witnesses who had supervisory positions at other garages. Mr. Majeau, for instance, had this to say (beginning at p. 1235):

> Q. [Y]ou're aware that the Truck Centre is, I guess for want of a better word, a retail operation? ... In other words, they repair trucks from outside third parties?
>
> A. Yes.
>
> Q. And I take it that - and that has an effect in terms of what you want to do high quality service at all costs for the retail business. Correct?
>
> A. Mm hmm. ... You are working with a dealership, that's what you're doing. That dealership has set hours.
>
> Q. So the dealership is different from -
>
> A. Definitely. Definitely. They have a much harder case. There's no question. ... They've got less hours to work with most of the time because the factory says,

"You're supposed to be able to do this" and believe me, you're not going to get another cent out of the factory.

Q. So there's real pressure on a dealership?

A. There's real pressure. There's no question about it, especially on warranty jobs. There's definitely more pressure there.

As to whether Mr. Challenger's entrepreneurial skills in operating a viable small garage are of any weight or relevance regarding the question of dilatoriness, here is what Mr. Fung, the only witness called by the Commission to address that issue, had to say (at p. 1610): "But, as I say, deliveries is okay. I wouldn't say it's 100% but it's on the border mark. I can't complain for the prices."

While I would be prepared to find that Mr. Challenger might have been an above average mechanic in other establishments in which he worked, I am certainly not prepared to draw any conclusion from that regarding his performance at the Centre. Counsel for the Commission could not, and did not, argue that the complainant's employment record elsewhere proved that he was not slow on the job at the Centre. That record was put forward simply to lend cumulative support to counsel's other submissions. Since I have found as a fact that the respondents reasonably concluded on the basis of the Centre's standards that the complainant was a slow worker, this particular submission is reduced to irrelevancy.

E. Whether the Complainant was Dirty or Sloppy

The respondents asserted that the complainant had been generally dirty or sloppy in his work, but they were unable to

provide specific examples of this other than in respect of w/o 21551, which concerned a mobile home. It was their unshakable evidence that Mr. Challenger was found by Mr. Dehaas working inside the mobile home without having spread the protective coverings that are supposed to be used. The interior of the specially furnished vehicle was in a soiled condition. Mr. Galligan was summoned to witness the situation.

There was a remarkable volume of evidence as to whether someone else could have caused the dirt, as though the gravamen of the incident was not the conduct, but its consequence. I must say that the evidence certainly points to Mr. Challenger as the cause of the dirty condition of the mobile home. As already noted, the practice is for the supervisor to inspect vehicles in order to bring to the attention of the customer conditions for which the garage might otherwise be later held accountable. The shoes, clothing and personal condition of the supervisors are generally clean and free of grease and other dirt. The documentation showed that the complainant was the first one of the Centre's mechanics to work on the vehicle. While Mr. Galligan admitted that the alternative causes suggested by counsel for the presence of the dirt in the mobile home were <u>possible</u>, they certainly were not probable.

In any case, I find as a fact that Mr. Challenger was working inside the mobile home without having taken the usual and proper precautions and, whether (as was reasonably assumed) he actually soiled it or not, his performance on that occasion was

sub-standard.

F. Whether the Allegation of Discrimination was Supported by Various Collateral Considerations

1. The allegation that the Centre had "similarly" discriminated against others of its employees.

My general view of Mr. Aston Brown's evidence has already been set out. He did not state that the mistreatment he alleged to have suffered was a matter of discrimination, nor is there any evidence from which such an inference can be drawn.

Mr. Trevor Radway, who after some fourteen years is still employed at the Centre, gave it as his opinion that he had been discriminated against at the Centre because of his colour. All that he offered as a basis for his impression was his view that he had been given a disproportionate share of the lubrication jobs, which he described as very dirty work. According to the evidence of them both, Mr. Radway discussed this with Mr. Galligan, was told that he was not getting an unfair number of such jobs, and received the suggestion that, if he felt strongly that he was being discriminated against, he should take it up with the Human Rights Commission. He was then furnished with the relevant pamphlets in that regard. Although no grievance or formal complaint was then (or ever) filed, the matter was discussed with the union representative. The review made of the lubrication work done over a specified period did not substantiate Mr. Radway's suspicions. (Indeed, most of this kind of work was done by a white mechanic nicknamed "Super Lube".) It was also agreed to monitor the situation for a similar future

period of time. The issue did not resurface. Clearly Mr. Radway's subjective impressions cannot be taken as proof of discrimination against him.

Finally, it should be mentioned that in the course of his giving his testimony, Mr. Yussuff was questioned as to the issue of discrimination. Mr. Yussuff is a member of a visible minority who was described by the respondents as being "brown", although one of the black witnesses stated that Mr. Yussuff was black. In any case, he said that, although he could speak for no one else, he had never personally experienced discrimination at the Centre.

Mr. Yussuff's evidence also touched upon an incident regarding a former black employee named John Wright. Mr. Galligan's evidence was that Mr. Wright, whom he described as having been a highly valued employee, was dissatisfied with management's decision to send him on a particular training programme, rather than on the one he would have preferred. Upon learning that Mr. Wright had decided to quit, Mr. Galligan asked Mr. Yussuff to try to persuade him to return. Mr. Yussuff spoke to Mr. Wright, but to no avail. According to Mr. Yussuff, during the course of their conversation Mr. Wright said that he felt he had been discriminated against. While I am quite prepared to believe that Mr. Wright said this to Mr. Yussuff, there is absolutely no evidence that he would have persisted in that view if pressed seriously about it, let alone that there actually had been such discrimination.

There is simply no basis for concluding that the respondents

discriminated against any of the Centre's other employees.

2. The allegation that few of the Centre's employees were black.

In his opening statement, counsel for the Commission suggested that the Centre hired and promoted such a disproportionately small number of blacks as to raise a suspicion (if not presumption) of discrimination. Lists of employees were demanded of the respondents, and they were questioned at length as to the colour of these employees and as to why the blacks amongst the unsuccessful probationary employees had been dismissed. However, no evidence was led as to how many black mechanics one should expect to see working at such an establishment if its hiring practices were free from discrimination. No studies or statistical data were presented for our consideration. And, in the end, the matter was not pressed by counsel during his argument.

In finding that this aspect of the Commission's case has not been established, I might also observe that it was Mr. Yussuff's evidence that the last survey taken by the union showed that 30% of the mechanics at the Centre were members of visible minorities.

3. The allegation that a white probationary employee was more favourably treated than the complainant.

As seen, Mr. Bob Bartlett, a white man, had been hired on probation at about the same time as Mr. Challenger, and it was alleged that he received better treatment than did the complainant. While the character of the work assigned to Mr. was

indeed different from that of the complainant, this was clearly because he had been hired as a general mechanic with automatic transmission experience, whereas Mr. Challenger had been hired as a general mechanic with diesel experience. It is not surprising that much of Mr. Bartlett's work was on automatic transmissions, nor is the fact that such jobs tend to be of shorter duration than the kind of work given to Mr. Challenger in any way discriminatory. Each of them, of course, worked full shifts.

Mr. Challenger alleged that he once overheard an "argument" between Mr. Dehaas and Mr. Bartlett concerning a "come back", and that at one point the foreman told Mr. Bartlett that he would take care of it. From this evidence I am asked to conclude that Mr. Bartlett had improperly performed his work, that Mr. Dehaas was covering up for him, and that this was discrimination against Mr. Challenger. It happens that there are several reasons why a vehicle may "come back" besides poor initial workmanship, and there was no evidence that this "come back" was Mr. Bartlett's fault. Mr. Dehaas denied ever trying to cover up any poor workmanship. But even had that been the case, unless it is argued that the poor workmanship of all whites is covered up while that of blacks is held against them, it would seem to be irrelevant. It would be absurd to suppose that the Centre would or could tolerate a policy of hiring incompetent mechanics and of covering up their poor workmanship, provided they are white. It would go bankrupt. Nor is there anything in the evidence to suggest that Mr. Dehaas covered up for Mr. Bartlett simply to make Mr.

Challenger look bad by comparison. The complainant's testimony regarding this "incident" does nothing to establish that Mr. Bartlett received favourable treatment at all, let alone in a manner discriminatory of Mr. Challenger.

Counsel for the Commission made much of the fact that Mr. Challenger's first evaluation was somewhat better than that of Mr. Bartlett, as I have indicated elsewhere to have been the case. However, the evidence of the respondents was that Mr. Bartlett improved greatly. Mr. Hladysh, the night foreman for whom Mr. Bartlett did much of his work, is also to that effect. Counsel for the Commission suggested that it was rather "convenient " for the respondents that Mr. Bartlett's second written evaluation could not be found. However, in light of all the evidence, I find no grounds for any such suspicion.

I have now come to the end of my analysis of the contentions of the parties regarding the first allegation of the complaint, and I turn now to the other allegation made in the complaint.

THE ALLEGATION OF HARASSMENT CONTRARY TO S. 4(2) OF THE CODE

Counsel for the Commission made no reference in argument to the allegation of harassment. He did not deal separately with the two allegations made in the complaint, but simply concluded that "there must be a finding of discrimination and contravention of the Code" (p. 3200).

There was scant evidence from Mr. Challenger regarding this allegation. He said that Mr. Dehaas told him very loudly on one occasion to take a truck out of the shop. On another occasion

(w/o 21551) he says Mr. Dehaas was after him to hurry up and told him he had 20 hours for a job that would normally take about 45 hours. Mr. Dehaas testified that he had told Mr. Challenger, in answer to a question, that he had 20 hours left. Mr. Challenger agreed that Mr. Dehaas pursued all the mechanics when he thought they were going slowly, and that he spoke loudly to them all. A final incident referred to by Mr. Challenger in respect of this allegation concerned the manner in which a particular job was to be done. He said that Mr. Dehaas insisted that he check for the source of the problem by taking some equipment apart in stages rather than removing it all at once. As it happened, Mr. Challenger's initial diagnosis was correct and it would have been faster to have done it his way. He said that he was made to "feel like a kid". The respondents evidence was that the proper procedure was as Mr. Dehaas had said, since normally even more time would be saved if the problem happened to be elsewhere. In any case, it was not even suggested that it was because he was black that Mr. Challenger was instructed to perform the job in the manner complained of, or that a white mechanic would have received different instructions.

APPLICATION OF LAW

The arguments of counsel do not reveal any real issue of law dividing them and, having regard to the various findings I have made, the application of the law to the facts of the case need not be dwelt upon at length.

It has often been observed that discrimination is seldom

overt and that the reliance of the Commission and the complainant upon circumstantial evidence is frequent and necessary. Such is the case here. As to the burden of proof, the following extract from Almeida v. Chubb Industries Limited (including the reference to the consensus of counsel on the point) is most apt:

> Counsel agree, as do I, with the proposition that the burden of proof in these cases remains with the Commission and the complainant to establish that contravention of the Code has, on the balance of probabilities, occurred. Nonetheless, I am of the view that if the complainant and the Commission can establish a prima facie case of discrimination, a secondary burden of "going forward" or adducing evidence of non-discriminatory grounds for the conduct under question falls upon the respondent. If this burden is discharged by the respondent, it then remains for the complainant and the Commission to establish, on the balance of probabilities, that the reasons offered by the respondent are not the true explanations for the decision in question. See: (1984), 5 C.H.R.R. D/2104, at paragraph 17843.

I would agree with counsel that this burden does not require the Commission to establish that the respondents' conduct, "to be found discriminatory, must be consistent with the allegation of discrimination and inconsistent with any other rational explanation", as it was put in Kennedy v. Mohawk College (an unreported Ontario Board of Inquiry decision, 1973). That test was rejected in Fuller v. Candur Plastics Limited (1981), 2 C.H.R.R. D/419 as being tantamount to proof beyond a reasonable doubt. In agreeing with that aspect of the Fuller decision, the British Columbia Human Rights Council (in Johal and Grewal v. Cowichan (1987), 8 C.H.R.R. D/3643) went on (at paragraph 28853) to say that "it is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any

rational alternative explanation. The respondent must offer an explanation which is credible on all of the evidence." (This is rather analogous to the plaintiff's position under the doctrine of res ipsa loquitur.)

Counsel for the respondents submitted that the complainant and Commission had not made out a prima facie case either of discrimination or of harassment and, indeed, when all was said and done, there was no credible evidence from which racial discrimination against Mr. Challenger could be inferred. In any event, the respondents have offered an explanation of their actions that were the subject of complaint. I find that explanation completely credible on the evidence, and the Commission and the complainant did not "establish, on a balance of probabilities, that the reasons offered by the respondents are not the true explanations for the decision in question."

Finally, with respect to the brief submission by counsel for the respondents as to costs, I do not find that the circumstances of this case bring it within the scope of sub-section (6) of section 40 of the Code. The complaint was not trivial, frivolous or vexatious, nor was it established that it was made in bad faith. Simply because a complainant has been less than truthful in some of his evidence (which was all that counsel suggested in this regard), it does not follow that his complaint was made in bad faith. Although counsel did address the second paragraph of the sub-section, it may be noted that the mere fact that a complaint has been dismissed is not proof of undue hardship to

the respondent in the particular circumstances.

CONCLUSION

For all the above reasons, I have concluded that these respondents did not infringe the complainant's right to equal treatment with respect to employment because of race, colour, ancestry, place of origin or ethnic origin, contrary to Sections 4(1) and 8 of the Code, nor did they infringe his right under section 4(2) of the Code to be free from such discriminatory harassment in the workplace. Consequently, it is my decision that the complaints of Mr. Challenger against the respondents are without foundation and must be dismissed (but without costs) and the order sought by the Commission denied. In the circumstances, I see no need to deal with the matter of damages.

Dated this 15th day of July, 1988.

H.A. Hubbard,
Chairman, Board of Inquiry